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No. 83-1358

# In the Supreme Court of the United States

OCTOBER TERM, 1983

M. P. DORAN, ET AL., PETITIONERS

*v.*

F. H. HOULE AND JAMES W. GLOSSER

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| *Arnett* v. *Kennedy*, 416 U.S. 134 | 6 |
| *Board of Regents* v. *Roth*, 408 U.S. 564 | 4, 7, 8 |
| *City of Santa Clara* v. *Andrus*, 572 F.2d 660 | 7 |
| *Gonzalez* v. *Freeman*, 334 F.2d 570 | 7 |
| *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 | 5 |
| *Perry* v. *Sindermann*, 408 U.S. 593 | 4, 7, 8 |
| *Standard Airlines, Inc.* v. *CAB*, 177 F.2d 18 | 8 |
| *W.G. Cosby Transfer & Storage Corp.* v. *Froehlke*, 480 F.2d 498 | 7 |
| Statute and regulation: | |
| 42 U.S.C. (Supp. V) 1983 | 2 |
| 9 C.F.R. Pt. 78, Subpt. B | 2 |

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Petitioners contend that the refusal to renew their brucellosis card test permits deprived them of their civil rights.

1. Petitioners are three Montana veterinarians who were issued brucellosis card test permits in 1976 under the joint authority of the Montana Department of Livestock and the United States Department of Agriculture (USDA). The permits, which were by their terms valid for one year, had all expired before they were withdrawn in November 1977 by respondent Glosser, the State Veterinarian for the Department of Livestock, because of irregularities in brucel-

losis testing by petitioners.[1] Following a hearing, the State Department of Livestock directed Glosser to reissue the permits, but respondent Houle, the responsible USDA official, refused to renew the permits pending the results of a separate federal investigation. When that investigation was completed, state policy for issuing permits had changed, and petitioners were no longer eligible for them. Petitioners then brought this suit under 42 U.S.C. (Supp. V) 1983 and the Constitution against Houle and Glosser in their personal capacities, claiming that respondents' actions deprived them of property (the permits) without due process of law. Pet. App. 4-5, 17.

Petitioners' permits were issued in connection with a joint federal-state program for the eradication of brucellosis, a serious, highly contagious disease of cattle that can be transmitted to humans in the form of undulant fever (Pet. App. 2). Cattle may not be shipped in interstate commerce unless they have been tested and certified free of brucellosis (9 C.F.R. Pt. 78, Subpt. B). Most brucellosis tests take several days to process in a central state laboratory (creating extra costs and inconvenience for the stockman); in contrast, the brucellosis card test is a rapid screening procedure that can be performed directly in the livestock market. If the test is negative, the cattle can be shipped immediately in interstate commerce. Pet. App. 3. It is therefore essential that the card test be administered properly to ensure accurate results.

The brucellosis card test is the exclusive property of the federal government, and cannot be used without its express permission (Pet. App. 3, 16). Be-

[1] Petitioners were informed of the reasons for the withdrawals (Pet. App. 4).

cause of the serious health and economic implications of misuse, use of the test is strictly controlled. Permits are issued by USDA, generally in conjunction with state livestock agencies, to qualified veterinarians. Permit holders are allowed to use the USDA-owned card test kit free of charge; they cannot charge cattle owners for performing the test, although they may charge for drawing the necessary blood sample (Pet. App. 3). Permit holders in private practice (*i.e.*, those who are not full time state or federal employees) remain free to conduct their usual veterinary practice as they see fit, and to charge the usual fees for their services.[2]

At the time relevant to this lawsuit, the brucellosis card test program in Montana was jointly administered by state and federal authorities pursuant to USDA Veterinary Services Memorandum 551.16 and a joint federal-state Memorandum of Understanding. These documents constituted the sole source of authority and procedures governing card test permits (Pet. App. 20). They provided for the issuance of annual permits to qualified applicants, but established no specific procedures for renewal or cancellation of expired permits.[3] The permits issued to petitioners contained specific dates of issuance and expiration, but were similarly silent as to renewal or cancellation (*ibid.*). Petitioners contended that be-

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[2] Petitioners were the only permit holders in private practice in Montana; most card tests were done by state employees (Pet. App. 4).

[3] Veterinary Services Memorandum 551.16 did, however, provide that "[p]ermits may be cancelled without prior notice if the permit holder uses the card test contrary to the conditions of the permit" (Excerpt of Record (Houle) 71-72).

cause the federal and state issuing authorities had taken no action to enforce the expiration dates of their permits, and had continued to supply them with the materials for making the tests, they were entitled to rely on the continuation of this practice. They also claimed that they had built a specialized veterinary practice based on their ability to offer the card test service. The district court accepted these arguments, and ruled that petitioners had stated a claim for deprivation of a protected property interest (Pet. App. 20-21). The court therefore allowed the case to go to the jury, which returned a verdict of $272,000 against the respondents (Pet. App. 5).

The court of appeals reversed.[4] Relying on *Board of Regents* v. *Roth*, 408 U.S. 564, 577-578 (1972), and *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972), the court held that petitioners had failed to establish the existence of an entitlement sufficient to create a protected property interest in the permits (Pet. App. 5-11). The court found no explicit or implicit limitations on the government's discretion to refuse to renew expired card test permits. The court held that the government's failure to enforce the expiration dates of petitioners' permits (or to establish specific procedures for their withdrawal) could not reasonably be interpreted as manifesting a "mutually explicit understanding[]" (*Perry* v. *Sindermann*, 408 U.S. at 601) between petitioners and the government that the permits would continue in effect indefinitely, particularly in light of the critical nature of the brucellosis eradication program and the strict controls

[4] The opinion of the court of appeals reprinted at Pet. App. 1-11 was amended on rehearing. The amended opinion (721 F.2d 1182; App., *infra*, 1a-11a) contains slight changes in the first and last paragraphs.

placed on the use of the card test (Pet. App. 9-10). Therefore, the court held, petitioners' claim to the permits was based only on a unilateral hope, and did not amount to a constitutionally protected interest.[5]

2. Petitioners' only contention appears to be that the court of appeals improperly overlooked the district court's conclusion (Pet. App. 20-21) that the permits "creat[ed] a specialized veterinary practice" that depended on the permits (Pet. 10). On that basis, petitioners contend that the district court properly concluded that the withdrawal of the permits deprived the petitioners of a property interest in the means of earning their livelihood, triggering certain due process requirements. They assert (Pet. 10-11) that these are factual findings that cannot be overturned unless clearly erroneous.[6] It is well established, however, that the existence vel non of a constitutionally protected property interest is a question of law that is freely reviewable. Cf. *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978). In any event, in ruling that petitioners failed to show any objective basis for their claim of entitlement to the permits, the court of appeals necessarily rejected the district court's contrary holding. And, obviously, no due process requirements are implicated unless petitioners first demonstrate the existence of a pro-

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[5] The court of appeals accordingly found it unnecessary to reach the other grounds urged for reversal, including the contention that there was, in any event, no denial of due process in the procedures followed, and the claim of a qualified official immunity (Pet. App. 11).

[6] Under petitioners' theory, these findings presumably should have been made by the jury, rather than the court.

tected property interest. *Arnett* v. *Kennedy*, 416 U.S. 134, 164 (1974).[7]

The court of appeals was clearly correct. Even if the property interest question were considered to be partly factual, nothing in the record supports the district court's purported finding that the government was somehow constitutionally responsible for the character of petitioners' practice. Contrary to petitioners' assertion (Pet. 11), the permits were not "impos[ed]" on their livestock yard practice; petitioners received the permits at their request and were under no obligation to use them. Moreover, they remained completely free to conduct their usual veterinary practice as they saw fit; they were not required to make any investment or forego any income-producing activity as a condition of receiving the permits or using the card test. Nor, contrary to petitioners' assertion (Pet. 11), did the government "rel[y] * * * on the private practice of veterinary medicine to implement the bruscellosis [*sic*] eradication program * * *". Petitioners were the only private practitioners in Montana at the time who held permits to administer the card test (Pet. App. 4). All other brucellosis testing, by card test or otherwise, was done by state and federal employees. Thus, when their permits were withdrawn petitioners were merely placed in the same position as other private veterinarians in Montana. They continued to be able to perform (and charge a fee for) all usual veterinary services for cattle, in or out of the livestock markets, including drawing the necessary blood sam-

[7] The district court determined that petitioners had not shown any denial of a liberty interest (Pet. App. 22-23). The court of appeals agreed (Pet. App. 11), and petitioners do not claim otherwise here.

ples for brucellosis testing. To the extent they had chosen to concentrate their practice around their ability to offer the card test service, that was a matter of their own business discretion; it was in no way required or imposed upon them as a necessary aspect of their participation in the card test program. Thus, while petitioners, in reliance on their expectation that they could continue to operate under their expired annual permits, may themselves have elected to create a veterinary practice that was dependent on their participation in the card test program, they cannot establish any objective source for that reliance of the kind necessary to create a constitutionally protected property interest in the continuing validity of the permits. *Board of Regents* v. *Roth*, *supra*. The Constitution does not insulate individuals from the consequences of their own business decisions.

3. The cases cited by petitioners (Pet. 11-15) to support their claim that a "business property interest" was created by their reliance on the permits are inapposite. Each of those cases involved a question of what process was due where an entitlement to a government benefit was already otherwise established. See *City of Santa Clara* v. *Andrus*, 572 F.2d 660 (9th Cir. 1978) (statute established the rights of certain preferred utility customers to rely on continued preference); *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964) and *W.G. Cosby Transfer & Storage Corp.* v. *Froehlke*, 480 F.2d 498 (4th Cir. 1973) (government contractors with established business relationship with the government could not be debarred without procedural protections).[8] No statute or regulation established petitioners' entitlement to

[8] We note in addition that *Gonzalez* was decided before *Roth* and *Sindermann*.

their permits, however, nor did the issuance of the permits create any business relationship with the government.

Petitioners' reliance on *Standard Airlines, Inc.* v. *CAB*, 177 F.2d 18 (D.C. Cir. 1949) is equally erroneous. That case, decided before *Roth* and *Sindermann*, involved an air carrier business that could not exist without government registration. By regulation, the registration could not be revoked without a hearing. Thus the very business itself was a creature of the registration, and the provision of procedural restrictions for revocation objectively entitled the carrier to rely on its registration. The only question before the court was whether the carrier's registration could be *suspended* without a hearing, and in light of the regulatory scheme, the court determined that it could not. As we have shown, however, petitioners clearly could conduct their veterinary practice without card test permits, and no statute, regulation or procedural restrictions provided any objective basis for their claim to continued entitlement.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

APRIL 1984

**APPENDIX**

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 82-3445, 82-3457 and 82-3465

M. P. DORAN, JAMES A. SCOTT and JAMES H. BAILEY, PLAINTIFFS-APPELLEES, CROSS-APPELLANTS

*v.*

F. H. HOULE and JAMES W. GLOSSER, DEFENDANTS-APPELLANTS, CROSS-APPELLEES

Argued and Submitted June 7, 1983

Decided Nov. 18, 1983

As Amended on Grant of Rehearing
Dec. 19, 1983

On Appeal from the United States District Court
for the District of Montana

Before ANDERSON and FLETCHER, Circuit Judges, and TAYLOR*, District Judge.

FRED M. TAYLOR, District Judge:

Three Montana veterinarians brought an action under 42 U.S.C. § 1983 and the Constitution against two government officials, Dr. Glosser who was employed by the state of Montana, and Dr. Houle who was employed by the federal government. The complaint alleged a conspiracy to deprive plaintiffs of

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* The Honorable Fred M. Taylor, United States District Judge, District of Idaho, sitting by designation.

certain government issued permits without due process of law. The permits in question, which were part of a joint federal-state disease eradication program, allowed the holder to perform a specific test for brucellosis in cattle. Plaintiffs obtained a substantial judgment following a jury trial and defendants appealed. We reverse on the basis that plaintiffs had no constitutionally protected interest in the permits.

## OVERVIEW

Brucellosis is a highly contagious and infectious bacterial disease. It occurs primarily in cattle, causing reproductive failure and the abortion of calves. Testimony at trial indicated that, by comparison, brucellosis is presently a greater threat to ranchers than anthrax or hoof-and-mouth disease. Brucellosis can also cause undulant fever and other ill effects in humans.

Montana is particularly vulnerable to this disease as cattle ranching is a major industry in the state. The Department of Livestock is the state agency directly responsible for monitoring and protecting the health of Montana's cattle population.

The federal government, acting through the United States Department of Agriculture (USDA), is also involved in regulating animal welfare. See 21 U.S.C. §§ 111, 114 (1976). One of the steps taken by the federal government to prevent the spread of brucellosis is a requirement that cattle moved interstate be tested and certified as "brucellosis-free". *See* Department of Agriculture Regulations, 9 CFR, Part 78, subpart B (1983).

There are a number of different tests which can be used to detect the presence of brucellosis in cattle. This case deals with the permits to perform a par-

ticular diagnostic test, the "card test". The principal advantage of the card test is its ability to quickly and reliably determine whether a particular animal does not have brucellosis. This makes it particularly suitable for use at auction markets where cattle are assembled and sold prior to interstate shipment.

The card test is performed on a blood sample which can be drawn by any licensed veterinarian. If the test results are negative, the animal is considered to be free of the disease and may be shipped across state lines. If the results are positive, additional tests are required to be certain the animal is not infected. In the interim, the suspect animal is placed in quarantine until follow-up tests can be completed.

The card test itself is owned by the federal government. The USDA has for many years issued permits to qualified veterinarians. These permit holders have never been allowed to charge cattle owners for performing the test, although as licensed veterinarians they may charge for drawing the necessary blood sample.

In 1973, alerted by a resurgence of brucellosis in Montana, the USDA and the Montana Department of Livestock agreed to cooperate in an aggressive joint-eradication program. The basic parameters of the program were set forth in two government memoranda: a federal Veterinary Services Memorandum and a joint federal-state Memorandum of Understanding.

All three plaintiffs applied for and were issued card test permits in 1976, pursuant to this joint federal-state program. At that time, Drs. Bailey and Scott had recently joined Dr. Doran's practice as salaried associates. Dr. Doran had been practicing veterinary medicine in Great Falls for approximately

twenty-five years and had previously held a card test permit. Plaintiffs were unique in that all other permit holders in Montana were employed by the state and worked exclusively at auction markets.

The dispute which culminated in this action began with the discovery in November, 1977, that two cows card tested by plaintiffs and found to be suspect had been released from quarantine prior to a final determination of their health by the Montana State Laboratory. On November 28, 1977, Dr. Glosser, the State Veterinarian for the Department of Livestock, orally notified plaintiffs that their permits were being terminated as a result of their failure to control the two suspect animals and their prior history of permit violations. A letter confirming the termination was mailed two days later.

Plaintiffs, who thought the termination unjustified, made no serious effort to appeal Dr. Glosser's decision until January, 1978, when they attempted to present their case before the Department of Livestock's Board of Directors. The Board Chairman advised plaintiffs they would need to make a formal request for a hearing. Such a request was made, but not until March 6, 1978. The matter was set to be heard in April. At plaintiffs' request, the hearing was subsequently postponed until May. In the meantime, one of the Board's staff attorneys presented plaintiffs with a three page letter explaining the reasons for Dr. Glosser's termination of their card test authority.

In May, the Board voted to reinstate the three permits. However, because of a subsequent federal investigation into the quarantine breach and changes in Department of Livestock policy regarding reissuance of card test permits to private veterinar-

ians, plaintiffs were unable to have their permit authority reinstated.

Plaintiffs then filed this action alleging that Dr. Glosser and Dr. Houle, an employee of the USDA, conspired to deprive plaintiffs of their constitutionally protected liberty and property interests without due process of law. Following summary judgment motions, the district court determined, *inter alia*, that a property interest did exist in the card test permits.[1] *Doran v. Houle*, 516 F. Supp. 1231, 1234 (D. Mont. 1981). The case proceeded to trial where a jury awarded plaintiffs compensatory and punitive damages totaling $272,000.

## MERITS

The threshold issue in this case is whether a constitutionally protected property interest was implicated. Although the answer to the question of whether a property interest was present necessarily depends on the facts in this case, it remains a legal issue requiring an interpretation of the federal Constitution. *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). Therefore, we are obligated to conduct an independent review of plaintiffs' claim and are not bound by the district court's prior determination. *See Shillingford v. Holmes*, 634 F.2d 263, 265-66 (5th Cir. 1981).

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[1] The district court also determined that defendants' actions did not violate plaintiffs' liberty interests. *Doran v. Houle*, 516 F.Supp. at 1235. Plaintiffs, on appeal, indirectly question this finding. We see no error in the district court's decision regarding plaintiffs' alleged liberty interest. *See, Bishop v. Wood*, 426 U.S. 341, 348-49, 96 S.Ct. 2074, 2079-80, 48 L.Ed.2d 684 (1976).

The Supreme Court in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) made it clear that property interests protected by procedural due process are not restricted to a few rigid, technical forms. Rather, the constitutional concept of property embraces a broad, although not infinite, range of interests. *Id.* at 571-72, 92 S.Ct. at 2705-06; *Perry v. Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972); *see generally* C. Reich, *The New Property*, 73 Yale L.J. 733 (1964).

To have a property interest in any government benefit, a person must have more than an abstract need or desire for it; he must have a legitimate claim of entitlement. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. Plaintiffs contend they have such a legitimate claim, while defendants argue that any expectation of continued entitlement was entirely unilateral.

A legitimate claim of entitlement cannot be premised on the Constitution itself, but must be derived from some independent source in either state or federal law. *Id.* In the immediate case, there were no statutes or regulations establishing administrative standards for issuing or revoking card test permits. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (social security disability benefits). Nor was there an express contract granting a right to continued possession. *Cf. Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) (war risk insurance policies).

The absence of a specific statute, regulation or written contract in this case does not necessarily foreclose the possibility that a property interest might have been created, although the absence of such formal sources is "highly relevant" to the due

process question. *Sindermann*, 408 U.S. at 602, 92 S.Ct. at 2699-700. The Supreme Court has declared that a legitimate claim of entitlement can also be based on the conduct and representations of government officials when their actions lead to the creation of a "mutually explicit understanding". *Id.* at 601, 92 S.Ct. at 2699.

The record shows that the card test program in Montana was jointly administered and regulated by the USDA and the Montana Department of Livestock. The permits were issued to qualified veterinarians in accordance with the policies outlined in Veterinary Services Memorandum No. 551.-16 and the joint federal-state Memorandum of Understanding. The Veterinary Services Memorandum merely describes basic federal policy concerning use of the card test and offers general guidelines for establishing "[a]n *annual* permit system". [emphasis added] The joint federal-state memorandum, which outlines the permit system in Montana, is just as cursory. The permits themselves, similarly, do not refer to any specific procedures for obtaining a renewal or challenging a cancellation decision, although each permit includes a specific date of issuance and expiration.

Each of these documents—the federal Veterinary Services Memorandum, the joint federal-state Memorandum of Understanding and the individual permits—included the following statement:

> *Annually, prior to renewal of the permit*, the permit holder may be required to . . . conduct and interpret the card test on standardized check test serums. . . . [emphasis added]

In this case, all three permits had expired at least eight months prior to the time Dr. Glosser termi-

nated plaintiffs' card test authority. On appeal, plaintiffs maintain that because the administering agencies failed to enforce the permit expiration dates the permits should be considered reissued. The facts do not support such a conclusion. Plaintiffs have not cited any testimony or evidence in the record which would indicate the state and federal agencies intended such a result or, by their actions, would have led a reasonable person to conclude that the permits had been renewed. Had plaintiffs applied for renewal but received no response from the government, it might have been possible to find that the permits had been reissued for another year. However, plaintiffs never made such a request; they simply ignored the renewal requirement and continued to perform the federally owned test. Therefore, to the extent plaintiffs retained any authority beyond the permit deadlines, that authority was held at the sufferance and will of the officials charged with administering the permit program in Montana. *See Otten v. San Francisco Hotel Owners Assoc.*, 74 Cal.App.2d 341, 168 P.2d 739 (1946) (nonrenewal of expired service contract).

Where the government, as the source of the interest in question, retains unrestricted discretion over future enjoyment of the interest, the interest is not a protected entitlement. *Bishop v. Wood*, 426 U.S. 341, 344-47, 96 S.Ct. 2074, 2077-78, 48 L.Ed.2d 684 (1976). Thus, if the permits were held at the will of the governments administering the permit program in Montana, it is axiomatic that plaintiffs can make no legitimate claim to continued possession.

Even if the annual permits had been implicitly reissued in this situation, it is apparent that the joint eradication program was designed to give the state

and federal governments unrestricted discretion over all matters involving card test permits. There were, for example, no published criteria for choosing among qualified applicants or specific standards for determining whether to renew a previously issued permit. *Cf. Roth*, 408 U.S. at 578, 92 S.Ct. at 2709 (no property interest, where no standards and criteria for reemployment).

Indeed, the very nature of the joint eradication program suggests that the administering agencies were to retain complete discretion in regard to card test permits. The program was created in response to the danger posed by the outbreak of a highly contagious disease which could have a potentially devastating effect on the economy and health of the state. Under these circumstances and without any affirmative statements to the contrary, it is reasonable to conclude that the operation of the program, including control over the card test permits, was left to the discretion of the responsible government officials. The absence of regulations governing permit issuance and cancellation can thus be seen as reflecting the need for flexibility inherent in this type of government program.

There is, finally, no direct evidence to support the existence of a mutually explicit understanding. The arguments offered to advance the existence of such an understanding in this case are not premised on anything the Montana Department of Livestock or USDA did, but on what they failed to do. Plaintiffs do not claim that any agency or official affirmatively represented that existing permit holders would be entitled to retain their authority indefinitely, or even beyond the first year. Instead, plaintiffs rely on arguments describing the governments' lack of action,

including the failure to enforce the permit expiration dates, establish permit renewal procedures and expressly provide that the permits could be removed at the discretion of government officials. Neglecting to enforce the permit expiration dates in this single instance cannot reasonably be said to have created a long-standing practice of ignoring the permit renewal requirement and there certainly is nothing which approaches a "common law" of reissuance in this case. *See Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1099 (9th Cir. 1981); *see also Roth*, 408 U.S. at 578, n.16, 92 S.Ct. at 2709 n.16. There is, for example, no evidence that the expiration dates of other permits were ignored or that the government agencies in this case were even aware that plaintiffs' permits had expired. The mere fact a person has received a government benefit in the past, even for a considerable length of time, does not, without more, rise to the level of a legitimate claim of entitlement. *Bollow*, 650 F.2d at 1099.

Similarly, the absence of regulations governing the permit program does not lead to the conclusion that the state and federal governments intended to create a right to continued entitlement. Rather, it tends to support the conclusion that plaintiffs held only a unilateral hope that the agencies would continue to recognize their authority in the future. *See Arena Del Rio, Inc. v. Gonzales*, 704 F.2d 27 (1st Cir. 1983).

In conclusion, it is evident from the record that plaintiffs' card test authority was held subject to the unrestricted discretion of those government officials administering the joint eradication program. Nothing has been shown which indicates the existence of an agreement contradicting the governments' discre-

tion and securing for plaintiffs a legitimate expectation of continued entitlement.

After fully reviewing the record in this case, we conclude that the jury's verdict was premised upon an erroneous legal conclusion regarding the scope of protected property under the due process clauses of the fifth and fourteenth amendments to the Constitution. Accordingly, we must vacate and remand the case to the district court with instructions to dismiss plaintiffs' action for failure to state a proper claim for relief under 42 U.S.C. § 1983 or directly under the Constitution. This result makes it unnecessary to discuss or decide any of the several additional issues raised by the parties on appeal.

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